

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,

*Plaintiffs,*

v.

FIRST DATA CORPORATION,

and

CONCORD EFS, INC.,

*Defendants.*

CASE NUMBER: 1:03CV02169 (RMC)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION  
TO EXCLUDE STEWART C. MYERS AS A WITNESS  
AND TO STRIKE THE EXPERT REPORT OF STEWART C. MYERS**

**I. Introduction**

On December 3, 2003, at roughly 7:00 p.m. EST, Defendants served the Expert Report of Stewart C. Myers on Plaintiffs and indicated that they intended to call Stewart C. Myers as a witness at trial, in violation of the Court's Scheduling and Case Management Order. Prof. Myers' report also indicates that he may offer additional opinions not disclosed in his December 3 report, perhaps in the form of a surrebuttal report not contemplated by the Court's Scheduling Order.<sup>1</sup>

Plaintiffs' motion should be granted for at least the following reasons:

- This Court specifically rejected defendants' request for a staggered exchange of expert reports. Defendants' failure to identify Prof. Myers and exchange his report on November 19 is nothing more than a thinly disguised attempt to circumvent that order.

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<sup>1</sup>Report of Stewart C. Myers at ¶ 17 and n.2 (Dec. 3, 2003).

- Defendants had numerous opportunities to disclose the existence of Prof. Myers to plaintiffs and the Court and instead waited until December 3 to do so, far too late for the disclosure to be meaningful in the context of the compressed schedule applicable to this case.
- Defendants will not be unduly prejudiced by the relief requested by Plaintiffs. Defendants have already identified Jerry A. Hausman as their expert on efficiencies and Prof. Hausman has filed a report setting forth his expert opinion on efficiencies. They do not need two, particularly in light of the prejudice to plaintiffs that will result if Prof. Myers is not excluded.

The Scheduling Order, as clarified on November 24, 2003, required parties to exchange preliminary and revised witness lists on November 10 and 21 and to exchange expert reports on November 19 and December 1 (or 3). Defendants have failed to comply with this schedule. Given the very short amount of time remaining before trial, defendants' failure to disclose Prof. Myers in a manner consistent with this Court's Scheduling Order has significantly prejudiced Plaintiffs and should not be countenanced by the Court. Plaintiffs therefore move to exclude Prof. Myers as a witness and to strike his expert report, and request an order barring any reliance on Prof. Myers by defendants or their experts.

## **II. Analysis**

During the scheduling hearing, defendants argued for staggered production of expert reports and took the position "that the party with the burden of proof on a particular issue should present the initial report and then have rebuttal reports."<sup>2</sup> The Court rejected their position, stating: "We don't have time to play games on he goes first, I go second. There's just not enough time for that."<sup>3</sup> By failing to disclose Prof. Myers until December 3, defendants have

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<sup>2</sup>10/29/03 Tr. at 37:6-9 (Steve Patton, counsel for Concord) (Attachment A).

<sup>3</sup>10/29/03 Tr. at 47:13-15 (Collyer, J.) (Attachment B).

effectively unilaterally adopted the expert report procedure that they proposed and that the Court rejected. Defendants' conduct here is particularly problematic in that Prof. Myers' opinion relates solely to an affirmative defense as to which defendants concede they carry the burden.<sup>4</sup> Indeed, parts of Prof. Myers' report appear simply to buttress their affirmative defense of efficiencies<sup>5</sup> and should thus clearly have been disclosed on November 19.

Defendants admit that they interpreted the Court's Scheduling Order to require them to file an initial expert report on November 19 and to disclose all experts well before December 3. Defendants also concede that any failure to disclose an expert in a timely manner would be prejudicial. Indeed, it was on these bases that defendants filed a motion to compel an initial report from plaintiff's rebuttal expert, Prof. Mark Zmijewski: "This Court ordered the parties to exchange expert reports on November 19, as plaintiffs insisted, simultaneously and *without regard for burdens of proof*."<sup>6</sup> Geraldine Alexis, counsel for First Data, stated in the hearing granting the motion: "We cannot prepare accurately getting that [Prof. Zmijewski's Expert Report] at the last minute."<sup>7</sup> As defendants observed in their motion, "[t]his Court's Order of

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<sup>4</sup>Defendants' Motion and Memorandum of Points and Authorities in Support of Motion to Clarify Scheduling Order and to Require Service of Expert Report of Dr. Mark A. Zmijewski by November 26, *United States v. First Data Corp. and Concord EFS, Inc.*, No. 1:03CV02169 (RMC), at 2 (D.D.C. filed Nov. 24, 2003) [hereinafter November 24 Motion] ("Plaintiffs bear the burden of proof (on all but the efficiencies defense) . . ."). A true and correct copy of the November 24 Motion is Attachment C hereto.

<sup>5</sup>Myers Report, at ¶¶ 12, 14-16.

<sup>6</sup>November 24 Motion at 1 (emphasis added) (Attachment C); *see also id.* ("Plaintiffs' failure to disclose Dr. Zmijewski or submit a report disclosing his opinions is contrary to this Court's Order.").

<sup>7</sup>11/24/03 Tr. at 8:18-19 (Attachment D); *see also* November 24 Motion at 2 ("Plaintiffs' violation of the Order they argued for is prejudicial.") (Attachment C).

simultaneous exchange . . . was intended to prevent such late disclosure of critical information.”<sup>8</sup>

Notably, at no time either during the hearing on the motion to compel or in the briefing that preceded it did defendants disclose that they had an additional efficiencies expert that they intended to disclose at the last minute.

Ultimately, the Court agreed with defendants’ interpretation of the Scheduling Order, while noting that the Scheduling Order was not clear on the issue. The Court stated: “[T]he intention was to have *all* experts issue at least a preliminary expert report based on the information that they had available to them as of October 23, so that all parties could properly or at least hopefully properly prepare for trial to the best of their abilities.”<sup>9</sup> Defendants, having obtained this clarification of the Court’s intention, failed to honor it. Defendants instead waited until the evening of December 3 to disclose the existence of Prof. Myers.

Defendants had multiple opportunities to make the required disclosure, including:

- November 21: Exchange of revised witness lists — Plaintiffs’ revised witness list included Prof. Zmijewski. Defendants did not include Prof. Myers.
- November 24: Defendants filed a motion with the Court to compel an initial report from Prof. Zmijewski. The Court ordered Plaintiffs to produce a report four days later on November 28. Defendants remained silent on the existence of, or their desire to add, an additional expert.
- November 26: Weekly telephonic Status Conference with the Court — Defendants remained silent on the existence of, or their desire to add, an additional expert.
- December 3: Weekly telephonic Status Conference with the Court — Defendants remained silent on the existence of, or their desire to add, an additional expert.

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<sup>8</sup>November 24 Motion at 2 (Attachment C).

<sup>9</sup>11/24/03 Tr. at 10:23 to 11:2 (Attachment D)(emphasis added).

Finally, defendants will not be unduly prejudiced by the relief requested by Plaintiffs. Defendants already have an expert who will offer an opinion on efficiencies: Jerry A. Hausman. Defendants proffered Prof. Hausman on November 19 as their sole expert witness on efficiencies, and then, ignoring the Court's Order rejecting a staggered exchange of initial and rebuttal reports, sprang Prof. Myers on plaintiffs at the last minute. Defendants carry the burden on their efficiencies affirmative defense and presumably understood when they asserted the defense on October 31 what they would need to do to carry that burden. Whatever it is that defendants believe they forgot to cover on efficiencies with Prof. Hausman, adding Prof. Myers at this late date in order to cure that deficiency simply cannot be the appropriate answer.

Moreover, defendants' actions – unilaterally giving themselves another round of expert witness identification and, apparently, reports – are an admission that the trial schedule is inadequate and unworkable for them. If it is unworkable for defendants, it is even more unworkable – and prejudicial – for plaintiffs, who bear the ultimate burden.

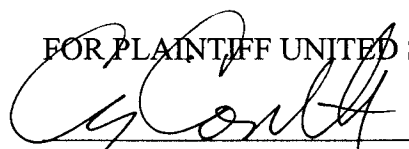
Defendants' disclosure of Prof. Myers at the end of the day on December 3, a mere twelve days before trial, is prejudicial and does not provide an adequate opportunity under this case's extremely compressed schedule for plaintiffs to understand and test the basis of this expert testimony. Only two days remained in the period for fact discovery, and many other events must occur between now and the start of trial. There is simply no time for discovery related to Prof. Myers and his opinions, for defendants to file an additional expert report (*in addition* to his untimely December 3 report), as apparently contemplated by Prof. Myers, and to prepare for and depose Prof. Myers prior to trial.

Under Rule 37 of the Federal Rules of Civil Procedure, the Court may impose a sanction


for both failing to follow a Court's discovery order and for a failure to disclose information required by Rule 26(a), which relates to expert discovery. Rule 37 specifically contemplates such a sanction and courts have regularly excluded expert witnesses whose disclosure, or lack thereof, violated a discovery order or was so late as to render effective discovery relating to the expert impossible.<sup>10</sup> Prof. Myers' expert report should be stricken and defendants should be precluded from calling Prof. Myers as a witness in this trial and from relying upon him in any manner. Given the short amount of time remaining before trial, plaintiffs respectfully request expedited treatment of this motion.

Respectfully submitted,

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Dated: December 6, 2003

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<sup>10</sup>See, e.g., *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710 (3d Cir. 1997) (counsel flagrantly disregarded the pretrial order); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375 (5th Cir. 1996) (finding no abuse of discretion in striking expert witnesses as a sanction for failure to identifying witnesses by a certain date, as required by the court's order); *Emmpresa Cubana Del Tabaco v. Culbro Corp.*, 213 F.R.D. 151 (S.D.N.Y. 2003) (finding of bad faith is not required to warrant exclusion of testimony from witness who was not timely disclosed; delay resulting from neglect is sufficient for preclusion); *Smith v. Union Pacific R. Co.*, 168 F.R.D. 626 (N.D. Ill. 1996) (expert report delivered so late that plaintiff's lawyers could not have deposed witness without violating discovery rules and standing order warranted sanction of exclusion of expert's testimony).